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IN THE

Supreme Court of the United States

October Term, 1964.

No. 376

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States And the Associate Justices of the Supreme Court of the United States:

Petitioner, Local 542, International Union of Operating Engineers, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 15, 1964.

OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board, and Intermediate Report, printed in the Appendix for use of the Court below (7a-25a), nine copies of which are filed herewith, are reported in 142 NLRB 1132 (1963). The opinion of the United States Court of Appeals for the Third Circuit, printed as Appendix B hereto, is reported in 331 F. 2d 99. The Decree of the United States Court of Appeals for the Th. d Circuit is printed as Appendix C hereto.

JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on May 15, 1964 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. (a) Where an employer and a labor union in the building and construction industry have bargained together nine years, and the union has continuously provided a pool of workmen for the employer, and the employer has made regular contributions to the union pension and welfare fund, may the employer suddenly sever relations with the union upon the expiration of collective bargaining agreement, and start subcontracting covered work to non-union firms, and refuse further to bargain with said union?

(b) Is picketing by the union to inform the public of such a breach a violation of Section 8(b)(7)(C) of the Act?

2. In the building and construction industry, where the employer has no employees in the union's craft, and does not plan to hire any in the near future, can an object of picketing be to require recognition or bargaining. In such case, if recognition should be deemed an object, is not such picketing proper even in absence of the filing of a representation petition within 30 days, since Sec. 8(f) of the Act specifically permits pre-hire agreements in such industry, at a time when an election is not feasible?

3. Where an employer in the building and construction industry files a petition for representation election within 15 days after picketing starts, and, one month thereafter, withdraws said petition in lieu of dismissal by the Regional Director as inoperative because there were no current employees in the craft, and then brings an unfair practice charge against the union for failure to file a representation petition within 30 days after picketing started, under Section 8(b)(7)(C), may the Board and Court below hold the union guilty of such charge, and, yet, hold that no such operative petition could have been filed because of absence of applicable employees? And, under the foregoing circumstances did not the employer's filing of the petition satisfy the requirement of Section 8(b)(7)(C)?

STATUTES INVOLVED.

The statutory provisions involved are the National Labor Relations Act, Sections 8(a)(3), 8(b)(7)(C), 8(d), 8(e), 8(f), 9(c), (29 USCA 158(a)(3), 158(b)(7)(C), 158(d), 158(e), 158(f), 159(c)).

STATEMENT OF THE CASE.

R. S. Noonan, Inc. and petitioner union have bargained together since 1952 (154a-171a; 172a-189a; 190a-206a; 6b-9b). The latest signed agreement expired on April 30, 1961, and Noonan did not sign a new written agreement with the union. However, Noonan did comply with the terms of the new industry contract by continuing to send monthly reports to the union's pension and welfare funds (38a; 62a-63a; 94a-115a; 208a-213a), as required by Article II, Sections 5 and 6 of the current 29-county collective bargaining agreement which covers the area involved herein (20b-21b).

Noonan filed a report each month through May 15, 1962, indicating thereon that no contributions were made inasmuch as Noonan had not employed any operating engineers for that period. There is no evidence that Noonan would not have continued to file said monthly reports but for the fact that a representative of Local 542 advised him, in April, 1962, that continued filing was unnecessary, so long as Noonan did not now, and would not in the foreseeable future, employ any operating engineers (63a-64a).

The Trial Examiner found, however, that all the reports after May 1, 1961, were filed in accordance with the 5-county agreement, (which does not cover the area involved), and not the 29-county agreement (17a). However, it is obvious from the face of the documents that no change or notation was made to indicate that the reporting after May 1, 1961 was upon a different basis or obligation (88a-93a; 94a-115a; 208a-213a). Noonan never notified the union that he was making any distinction between the 5-county and the 29-county areas. He always filed one report for both and continued to do so until he terminated completely as above stated.

Officials of the charging company testified that Noonan did not currently employ, and had not employed since 1957, any operating engineers (30a; 37a; 49a). In addition, ac-

cording to the report filed by Noonan, the company did not plan to hire any operating engineers in the near future (209a).

During the time in question, Noonan was engaged as a general contractor in the construction of a freight terminal in York, Pennsylvania; alteration of a packing plant in York, Pennsylvania; the construction of dwelling units in York, Pennsylvania; and the construction and installation of a converter boiler in Spring Grove, Pennsylvania (42a-43a). These projects were within the jurisdiction of the local, and Noonan, instead of hiring operating engineers, subcontracted that work to others (38a).

In the spring of 1962, Noonan entered into a subcontract with Hanover Construction Company to perform work within the mechanical jurisdiction of operating engineers on an "open-shop" basis. The company had been negotiating the execution of the Hanover contract from November, 1961 until April, 1962 (54a). The opening sentence of the document that reflected the agreement between Noonan and Hanover Company stated:

> "It is understood that all work described herein has been estimated and will be executed on an *open shop basis.*" (214a)

Said provision was in direct violation of Article I, Sections 1-3, the recognitional provisions, and Article II, Section 2, the pre-hire clause, of the 29-county agreement (17b-18b). Hanover began working at the four jobs on or about May 1, 1962 (55a).

The representatives of Local 542 were aware of the fact that Hanover was a non-union contractor. Accordingly, on or about May 1, 1962, respondent began to picket Noonan, Inc. at the four above-mentioned job sites. The sole object of the picketing was to inform the public that Noonan, Inc. was violating its contract with Local 542 by subcontracting work within the mechanical jurisdiction of operating engineers to non-union contractors. The first

picket sign carried the words "R. S. Noonan, Inc. unfair to Operating Engineers, Local 542" (43a). The legend was changed at a later date to read, "Dispute between R. S. Noonan, Inc. and Operating Engineers, Local 542" (43a). Two minor isolated instances of non-performance of duties by employees of other employers occurred at one project (44a-45a). On two jobs separate gates were opened for some of the contractors and they continued their work uninterrupted by the picketing (55a-56a). On the housing project, employees of the electrical contractor stopped work while the picketing continued.

Shortly thereafter, Noonan filed unfair practice charges against respondent. On May 16, Noonan filed a representation petition for an election in the appropriate unit for operating engineers (83a). On June 12, Noonan withdrew the petition on the ground that it had no operating engineer employees among whom an election could be conducted (86a-87a), and with the understanding that the Regional Director would dismiss the petition as inoperative if Noonan did not voluntarily withdraw it (15a).

Noonan was currently and continued to be a member of the General Building Contractors Association (GBCA) of Philadelphia, which had a signed written contract with respondent covering a 5- county area in and around Philadelphia (39a). Article I, Section 1 of that contract provides:

> "The Employer recognizes the Union as the collective bargaining agents for all persons performing work within the mechanical jurisdiction of the Union, whether or not any of such persons are members of the Union, . . ." (126a)

Article I, Section 3 provides in relevant part:

> "The territorial jurisdiction of the Union covers the eastern half of Pennsylvania and the State of Delaware. . . ." (126a)

This section also provides that the provisions of the agreement apply to work performed in Philadelphia, Delaware, Bucks, Chester and Montgomery counties.

Noonan's charge against the union alleged that its activity constituted an unfair labor practice within the meaning of Section 8(b)(7)(C) of the National Labor Relations Act, 29 U. S. C. A. 158(b)(7)(C). After complaint and hearing, the Trial Examiner held that the union had violated the Act and the Board affirmed. The Board concluded that an object of the respondent's picketing was to force the employer to recognize or bargain with the union, and that the union picketed in excess of thirty days without a representation petition having been filed, in violation of Section 8(b)(7)(C) of the Act. The Board held that the filing of a representation petition by the employer, subsequently withdrawn, did not satisfy the requirements of the section (6a-11a; 17a-22a). The Board filed a Petition for Enforcement, which was granted by the Court of Appeals.

The Court of Appeals held that there was no existing recognition, contractual relationship or obligation between employer and union; that the past relations between them placed no continuing obligation on the employer to bargain after expiration of a written contract, and, that, therefore, the picketing was to force recognition, and not to inform the public that the employer was violating its agreement. The Court held, in this connection, that the fact that, at the time of the picketing, there were no operating engineers working for the employer that the union could represent, did not prevent the picketing from having as its object the forcing of the employer to recognize and bargain, and that failure, therefore, to file a representation petition made it an unfair practice. On the other hand, however, the Court below also held that the representation petition filed by employer within thirty (30) days after picketing began did not satisfy the statute, since there were no operating engineers then working for the employer that the union could have represented, and such petition was inoperative,

there being no one who could have voted in an election. Concerning this, the Court held that the statutory provision for pre-hire agreements in the construction industry (Section 8(f)) did not render proper picketing to achieve a pre-hire agreement; that Section 8(f) sanctions a "voluntary negotiation of pre-hire agreements in the construction trade" and that picketing is not thereby permitted, since it would amount to "coercion . . . to compel execution of a pre-hire agreement", which, the Court said, was not intended by Congress.

Thus, the Court below holds that a union may be guilty for picketing for recognition more than thirty (30) days without filing a representation petition and, yet, holds that, under the same circumstances, the representation petition that *was* duly filed by the employer was not operative, because of the absence of the very employees that the union is said to be guilty of trying to represent. Anomalously, the Board and the Court below have held the union guilty for failing to do something that was impossible of performance.

Further, the Court's decision means that, although the pre-hire agreement is specifically recognized by the statute without any exception, it is a special creature, which can only come into effect by being offered by the employer to the union, and may not be the object of the usual economic pressure properly exercised by unions in obtaining their proper terms of agreement.

This improperly subjects the specific provisions of Section 8(f) to the general prohibitions of 8(b)(7)(C). And, most significantly, the Court below does thereby deny the right to picket unless it is specifically provided for by statute, rather than complying with the pronouncement by this Court that picketing, as a part of free expression, is the general right of the people, which can be prohibited only by specific, reasonable, and constitutional provision. Under the language of the Act, this deprivation of the Court below of the right to free expression directly conflicts with the consistent decisions of this Court on the subject.

REASONS FOR GRANTING THE WRIT.

I. An Employer, After Nine Years of Recognition of a Union, Cannot Suddenly Sever Relations Upon Expiration of a Written Collective Bargaining Agreement; Respective Obligations and Relationships Continue, Including the Duty to Continue to Bargain With the Union for Extension or Modification of the Contract. The Decision of the Court Below to the Contrary Directly Conflicts With Section 8(d) of the National Labor Relations Act.

R. S. Noonan maintained and complied with the collective bargaining agreement with petitioner union since 1952. In 1961, the written agreement having expired, no new writing was signed. However, relations, compliance with current contract provisions, and reports to the union pension and welfare funds *continued as theretofore*. In short, nothing changed except the existence of a writing. A year after the last writing expired, the employer entered into an open-shop subcontract for operating engineers, to work within the jurisdiction of the union. The employer, the Board and the Court below take the position that the expiration of the writing immediately terminated all relations and obligations remaining between employer and union. But, this contention must fall, in face of the provisions of the National Labor Relations Act, and, also, of the specific circumstances of this case.

A. The Act Contemplates a Continuing Relationship and Obligation Even After Expiration of a Collective Bargaining Agreement.

The Act, in the interest of preserving industrial stability, provides, in Section 8(d) thereof, 29 USCA 158(d), that an employer who desires to terminate or modify a collective bargaining contract must:

1. Notify the other party in writing of the desire, sixty days before the expiration date of the contract;

2. Offer to meet and confer with the union, to negotiate a new contract or modifications of a contract;

3. Notify the Federal Mediation and Conciliation Service, within thirty days of such notice, unless agreement has been reached by them;

4. Continue in full force and effect, all terms and contions of the existing contract for a period of sixty days after such notice is given, or until the expiration date of the contract, whichever occurs later.

The section outlines the obligations and responsibilities involved in collective bargaining and in the termination of the existing contract. The Act carefully intertwines termination with the necessity for renegotiations; one may not be accomplished without the other. This comports with the general intention of the Congress *to maintain a relationship between the parties in effecting stability in the industry and protection of hard won gains over the years.* It is obvious that the Act specifically recognizes the continuing relationship even after a natural expiration of the term of the writing.

In the context of the Act, even in case of proper notice, "termination" of an existing collective bargaining agreement does not sever the relationship as would ordinarily be the case in contracts generally. The Act requires both sides to continue to bargain. For, rights do not just abruptly end, nor do the relative obligations. In virtually all such agreements, provision has been made for pension plans, welfare plans, employees' security and other benefits, all of which look to the future, long after the termination date of any contract.

This relationship is not one-sided. On the part of the unions, continuing obligations also arise. This is espec-

cially true in the construction industry, where almost all employment is casual and, accordingly, there has been built up a reservoir of men, experienced, skilled and devoted to the industry who are readily available for employment by all of the contractors as they need them. This is of great benefit to employers, who might otherwise be required to maintain a steady pool of experienced and skilled operators for their extremely high-priced equipment. The fact that an employer, for his own benefit, may see fit not to draw from this pool does not make him any less an employer, nor detract from this *relational obligation.* At the very least those employees in the pool who have actually worked for Noonan must be qualified and eligible as its employees.

Thus, termination of a collective bargaining agreement (especially in the construction industry) does not and cannot, under the existing law, mean a break in the relationship between the parties. This is just what the Act recognizes and implements. While, under the general law of contracts, either party may terminate as provided, and just "walk away" from the transaction, such is not the situation where a collective bargaining agreement is involved. A *relationship* has been created, and rights and obligations arise and continue to exist. As stated in *Zdanok v. Glidden Co.*, (2 Cir., 1961) 288 F. 2d 99, the expiration of such agreement cannot cancel the employees' vested rights.

B. The Employer Here Specifically Recognized the Union as Bargaining Representative, and by Its Course of Dealing, Has Continued Actively to Do So, Even After the Expiration of the Expressed Term of the Written Agreement.

At the time of the material events here, Noonan already recognized petitioner as bargaining representative for operating engineers in the 29-county area, which included York County, involved herein. Not only is there a

long history of collective bargaining (154a-206a), which has established broad vested rights between the parties as expressed in *Zdanok v. Glidden, supra,* but Noonan continued, after the expressed term of the contract had expired, to comply with the terms of the 29-county agreement, by sending regular reports to the union's pension and welfare funds through May, 1962 (88a-115a; 208a-213a).

The law not only protects vested rights after expiration of a contract, but, also, will imply a contract in fact because of such circumstances as *compliance,* which manifests assent to the terms thereof. Restatement, Contracts, Section 5; Williston, Contracts, Section 22A (3rd Ed. 1957). Thus, in *Rabouin v. NLRB,* (2 Cir., 1952) 195 F. 2d 906, affirming *Conway's Express,* 87 NLRB 972 (1949), the acceptance of benefits of an agreement by an employer, without signing the agreement, nevertheless bound him to the contract as if he had been a signatory. To the same effect was *NLRB v. U. S. Steel Corp.,* (3 Cir., 1960) 278 F. 2d 896, 897-98.

Further, Noonan was, at all times material, still a member of the 5-county General Building Contractors Association, which has a collective bargaining agreement recognizing the union as exclusive bargaining representative for all operating engineers throughout the eastern half of Pennsylvania (126a). This agreement was limited to five counties, but, the "recognition" provision specifically delineated the union's territorial jurisdiction. Outside the five counties, the terms and conditions do not apply, *but the recognition provision does.* Otherwise, Article I, Section 3 thereof, would be wholly without purpose in the agreement.

Thus, clearly, by the intendment of the Act, by the past course of dealing, and by the then current circumstances, Noonan continued, at the time in question, to be in recognitional relationship with the union, and under a duty to comply with the current collective bargaining agreement.

C. The Picketing by the Union Was Proper, Protected Activity; It Was to Inform the Public That the Employer Was Violating Its Collective Bargaining Agreement With the Union by Subcontracting Work Within the Union's Category.

As we have seen, at the time of the picketing, the union was in a bargaining relation with the employer, who was bound by the current 29-county agreement. This agreement provided, Article I, Sec. 1-3; Art. II, Sec. 2 (17b-20b), that Noonan recognized petitioner as bargaining agent for persons performing operating engineer work in the eastern half of Pennsylvania and Delaware, and would not hire persons not referred by the petitioner. Despite this, Noonan subcontracted engineer work to a non-union firm. Therefore, petitioner union began to picket Noonan, in order to inform the public that Noonan was violating its contract. The legends on the picket signs bore out the union's informational purpose.

The fact that there were several isolated instances of non-performance of duty by several individuals employed by other concerns did not render this informational picketing violative of Section 8(b)(7)(C). There is no evidence that the union solicited any employees to leave their work or to join the union. The fact that some employees refused to cross the picket line merely reflected their approval of the informational objective. See *Local 107, International Hod Carriers*, 138 NLRB 102, 104 (1962). The Board itself has strongly rejected a "literal" and "inflexible" reading of the second provision of subsection (C). *Retail Clerks Local 324*, 138 NLRB 478, 489 (1962). There, the Board held that even though picketing is for a proscribed object, Section 8(b)(7)(C) is not violated if the picketing is to truthfully advise the public (486), and any interferences in performance of services are isolated and do not disrupt the employer's business (491). Here, such was the case. And, when additional gates were opened for contractors, the picketing thereafter caused *no* interference (55a-56a).

The Board and the Court below ask: what object could such picketing have, if not to gain recognition? It has been contended many times and under many circumstances that all picketing has this single ultimate objective. This is clearly not true. However, because of this contention, the courts have made a distinction between immediate and ultimate objectives, and have made it clear that only picketing which has recognition as its *immediate* objective is prohibited. Further, the courts have required *substantial independent evidence* to warrant the conclusion that an object of picketing was recognitional. *Penello v. Retail Store Employees Local 692,* (D. Md. 1960) 188 F. Supp. 192, 201.

In *Lebus v. Building and Construction Trades Council* (E. D. La. 1961) 199 F. Supp. 628, Judge Skelly Wright, refusing an injunction under 8(b)(7(C) held that the informational picketing proviso of subsection (C) qualifies the whole preceding part, so that picketing which *may* be deemed recognitional becomes proper and protected if it is also informational (632). Indeed, the proviso is not even invoked unless an object of the picketing is for recognition. The Court said (at 632-633):

> ". . . If picketing is neither organizational nor recognitional, it does not violate the section. As to such picketing, the second proviso serves no purpose. Its usefulness is limited to permitting certain picketing *otherwise* condemned in Sec. 8(b)(7)(C). . . .
>
> * * *
>
> ". . . Suffice it to say that the clear intent of Sec. 8(b)(7)(C) is to exclude from the prohibition of the Act picketing which, while embracing the proscribed object of recognition or organization, nevertheless meets the condition, first, of truthfully advising the public . . . and, second, of not inducing any individual employed by another not to pick up, deliver or transport goods or perform services." (Emphasis supplied.)

Judge Wright then stated that, while there *were* some isolated instances of refusal to cross picket lines, they did not substantially affect the progress of the work, observing, at 633:

> ". . . If there were any real intention on the part of the Union to stop deliveries, undoubtedly there would be more respect for the picket line."

In view of the limited amount of coercive effect, the Court properly felt that "it must be assumed that the primary purpose of the picketing was informational and thus protected by the Act." (634)

The Board and the courts have made it clear that informational picketing is still a valid and vital union strategy. Since petitioner's picketing in the instant case was exclusively informational, it was not an unfair labor practice and cannot be enjoined, irrespective of the isolated effects it may have had on the performance of duties by employees of other persons.

II. Where an Employer Has No Employees Whom the Union Can Represent, Has Not Had Any for the Past Few Years, and Does Not Plan to Hire Any in the Near Future, Picketing by the Union Cannot Be Deemed to Have Recognition or Bargaining as an Object, Within the Meaning of Section 8(b)(7)(C) of the Act.

Section 8(b)(7) of the Act proscribes picketing:

> "any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as representatives of his employees. . . ." (29 U. S. C. A. 158(b)(7)) (Emphasis supplied.)

Noonan has not employed an operating engineer since 1957, and company officials stated that it does not foresee hiring any in the near future. Thus, in view of the built-in limita-

tion, the picketing in this case could not fit within the statutory prohibition. The section specifically refers to union activity concerning *current* employees, which do not appear here, nor is there reasonable probability as to the future.

Thus, in *McLeod v. Local 140, Bedding, etc., Workers*, (S. D. N. Y. 1962) 207 F. Supp. 525, a New York mattress manufacturer, operating under a franchise from a national concern, lost its franchise, which was assumed by another manufacturer, with plants in a different area. As a result, the first-named employer discharged its manufacturing employees, who picketed the New York showrooms of the transferee, with signs appealing for return of their jobs. The company contended that the picketing was to obtain recognition for the union. The Court noted that the picketers were manufacturing personnel, that the picketed place was a showroom employing only sales and clerical employees, that the company had no manufacturing plant within the jurisdiction of the local involved (528-29). Thus, the Court held that "the circumstances here do not logically support the conclusion or even the inference that Local 140 is engaging in recognitional picketing" (528). As to possibilities for the future, the Court held that such would be "spe ulation in which this court is not inclined to indulge". (529). Similarly illogical and speculative is the conclusion below in the instant case.

The Board and Court below hold that the absence of engineers on Noonan's payroll and the assertion that none would be hired in the near future do not preclude recognition as an object of the picketing. This appears to require a *warranty* as to the future before Noonan's statement of intention will be given any weight in the proceeding (8a). However, we people, who make up courts, boards, juries, and parties, can and *may* consider only the facts and statements that do appear before us. The statement by Noonan, uncontradicted, is that the company did not intend to hire engineers in the near future. *This*

is what the Board and the Courts must decide the issue upon—not upon a guaranteed future, assured through clairvoyance.

Faced with the fact that Noonan employs no operating engineers, and the absence of any objective evidence indicating that the picketing was to gain recognition as bargaining agent for these non-existent employees, the Board proceeds to charge the union with "picketing . . . to attain its objective even before employees are hired."[1] Adoption of this reasoning would render suspect any proper picketing for *any* non-existent improper reason. The only limitation upon condemnation of picketing would be the extent of one's imagination.

The Court below cites *Local 705, International Bhd. of Teamsters* (D. C. Cir. 1962), 307 F. 2d 197 to support its position about the future. But that case is wholly inapplicable to the instant situation. There, even as the Board expressed it, "the union was picketing to force the employer to hire certain union members to perform work that was *already being performed by other employees*" of the same company. In the instant case, the company employed *no* operating engineers; it *was not performing the type of work* within the engineers' jurisdiction. Thus, there was, here, no reason or basis to conclude that the union was seeking recognition to bargain for any of its members.

The Court below also cites *Sperry v. Local Union 562, United Assn., etc. Plumbing* (W. D. Mo. 1962), 210 F. Supp. 743, where the court was unable to see any distinction between future employees and employees who are already working (747). But, in that case, although the employer did not then employ workers whom the union could represent, the employer obviously intended in the immediate future, to hire such employees, and did, shortly thereafter

1. Yet, as discussed *infra*, when deciding the operability of the representation petition filed by the employer, the Board refused to consider the pre-hire effectiveness of the petition, stating that it was not operative because of absence of *current* employees.

hire them (745). The instant case is the opposite situation. Five years previously, Noonan employed operating engineers, but then changed its policies and has not employed any since, and has specifically stated that it *does not intend* to hire any. The reasoning of the Board and the Court below assumes that the affected workers *were or would be* eventually hired. This is contrary to the facts and the admitted intention of the employer.

III. In the Construction Industry, Wherein Pre-Hire Agreements Are Valid, Under Section 8(f) of the Act, Where the Employer Currently Has No Employees Whom the Union Can Represent, Section 8(b)(7)(C) Is Not Applicable and Picketing to Achieve Pre-Hire Recognition Is Proper Without Filing Representation Petition, Since an Election Is Not Then Feasible. In Making a Contrary Decision, the Court of Appeals, Applying the General Provisions of Section 8(b)(7)(C) in Derogation of the Specific Provision of Section 8(f), Has Decided an Important Question of Federal Law Which Should Be Settled by This Court. Further, by Limiting the Right to Picket Where Not Specifically Prohibited by the Act, the Court Below Is in Direct Conflict With the Decision of This Court in *NLRB v. Fruit and Vegetable Packers*. — U. S. — (1964).

But, let us assume, for this case, that the union's picketing was *not* informational, but did have recognition as its object. It is indisputable that such recognition would have to be concerning *future* employees—that its purpose was to obtain a pre-hire agreement.

In the building and construction industry, pre-hire agreements are valid, under Section 8(f) of the Act, 29 U. S. C. A. 158(f). If this section is to be given *any* application or effect, the representation petition provision of Section 8(b)(7)(C) must be held inapplicable to pre-hire recognition picketing in the construction industry. For, in absence of current employees eligible to vote in the

unit, an election is not feasible and a representation petition is wholly inoperative. The Board and the Court below readily recognize the inoperability. But, they here hold that the Act "has given its sanction to the *voluntary* negotiation of pre-hire agreements", and that picketing to obtain such agreement is not permitted. This position conflicts with the language of the statute and the constitutional right to freedom of expression.

The Board and the Court below take the position that the statutory approval of pre-hire agreements places such agreements in a category different from other approved practices. There is no reason or justification to say that the union cannot picket to obtain a construction industry pre-hire contract, but *can* picket to obtain a contract requiring that employees must join the union within thirty days after employment, as provided in the proviso in Section 8(a)(3), 29 U. S. C. A. 158(a)(3). Yet, both provisions are specially and equally authorized by statute. There being nothing in the statute forbidding picketing to obtain either type of agreement, both may be sought by the usual means of economic pressure. The fact that an employer enters into a pre-hire agreement after picketing does not make it any less voluntary than when he enters into *any* collective bargaining agreement after any union activity or pressure. The labor relations acts and their amendments specifically protect strikes and picketing, so long as the *object* is legitimate; thus, given a legitimate object, picketing to obtain it cannot be proscribed. *Lebus v. Local 60, United Assn. of Journeymen, etc., Plumbing* (E. D. La. 1961), 193 F. Supp. 392, at 393.[2]

In *Cuneo v. Essex County, etc., District Council of Carpenters* (D. N. J. 1962), 207 F. Supp. 932, the Court held that a strike was properly used to secure the subcontracting clause permitted by Section 8(e), 29 U. S. C. A.

2. That case involved the Section 8(b)(4)(A) prohibition against "coercion" when an object was to force an employer not to handle goods of another. The proscriptive language and policy of that subsection and 8(b)(7)(C) are the same.

158(e). This section specifically prohibits an agreement whereby the employer agrees to cease doing business with any other person; but it contains a proviso that nothing therein applies to an agreement in the construction industry relating to subcontracting of work. The court said, at 939, that since the proviso expressly excepts the type of agreement in question, a strike to force inclusion of such a clause is not an unfair practice, any more than it would be to force assent to a higher wage provision. Judge Wortendyke referred to *Kennedy v. Construction, Production and Maintenance Laborers Union* (D. Ariz. 1961), 199 F. Supp. 775, where the Court held that picketing in the construction industry to obtain a "subcontracting clause" is not prohibited since the *object* thereof was legal and protected. The Court quoted the statement from that case observing that the direct mandate of the Act excepting "subcontracting clauses" from its prohibitions, is so clear and unequivocal, "that there is no reason to invoke the ordinary rules of statutory construction, nor for that matter any particular reason to use or invoke the Congressional history of the legislation" (207 F. Supp. at 943). The reasoning and interpretation in the foregoing cases are equally applicable here. Any remarks appearing in legislative history become immaterial in the face of the clear permissive language of the statute.[3]

It would be contrary to basic contract law to consider a contract involuntary because it was made after various pressures were brought to bear upon one of the parties. If involuntary, there would have been no meeting of the minds, and, thus, no contract. As many mercantile agreements are reached because of pressure and coercion, as not. The law protects pressure by picketing, so long as

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3. The conclusions to the contrary expressed in *NLRB v. International Hod Carriers, etc.* (8 Cir. 1960) 285 F. 2d 397, 403; and *Sperry v. Local Union 562, United Assn. etc., Plumbing,* (W. D. Mo. 1962) 210 F. Supp. 743, which bodily adopted the remarks in the legislative history are, we submit, incorrect applications of the statute which specifically protects the object of the activity in question.

the object is proper. How many legally enforceable collective bargaining agreements were ever really made by both labor and management "voluntarily" in the abstract sense? Indeed, to adopt the concept of the Court below would require that the employer *offer* to the union a pre-hire agreement, before the union took *any* steps to get it. We submit that the Act must be applied in a more realistic manner.

There is an additional and independent reason why picketing is permissible to achieve a pre-hire agreement. The decision of the Court below assumes that the right of free speech and expression by picketing, exists *only* where Congress specifically allows it, but otherwise, is prohibited. It expresses the shocking policy that labor unions are permitted to do only those things listed for them by statute, instead of reserving to them everything which statute does not prohibit. This position cannot stand the test of the Constitution nor of the pronouncements of this Court. *We submit that the right to picket, as an expression of free speech, is the rule, and that it can be denied only by specific and reasonable prohibition;* that the policy of the Constitution and the National Labor Relations Act, as supplied by this Court, *is to permit all peaceful activity which is not specifically prohibited.*

This Court has recently reaffirmed the principle protecting peaceful picketing for a lawful object as a proper exercise of free speech and expression, holding that it is the *rule*, rather than the exception. In *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, — U. S. —, 12 L. ed. 2d 129 (1964) this Court held (L. ed. at 133):

> "... Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established

> flow from such picketing.' Labor Board v. Drivers Local Union, 362 U. S. 274, 284. We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' ibid., that Congress intended to do so as regards the particular ends of the picketing under review. *Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.*" (Emphasis supplied.)

In that case, where this Court was concerned with secondary picketing, Mr. Justice Brennan, speaking for the majority, emphasized the "narrow focus" which must be assumed when considering the proscription of peaceful picketing (L. ed. at 134). It was emphasized that the right to picket, as an exercise of free expression, is the *rule*, and proscription thereof the *narrow exception* (L. ed. at 137-138). This Court, although specifically recognizing that even peaceful picketing may, and often does, have collateral and incidental effects, confirmed the guarantee of such activity unless a reason to proscribe it appears in the *clearest* manner, and said (L. ed. at 138):

> ". . . Be that as it may, our holding today simply takes note of the fact that a broad condemnation of peaceful picketing, such as that urged upon us by petitioners, has never been adopted by Congress, and an intention to do so is not revealed with that 'clearest indication in the legislative history,' which we require. Labor Board v. Drivers Local Union, supra. . . ."[4]

4. In *United Steelworkers of America v. NLRB*, 11 L. ed. 2d 863, 868 (1964), this Court emphasized that "picketing has traditionally been a major weapon to implement the goals of a strike," and that the right to primary picketing has been specifically preserved.

Mr. Justice Black, concurring, elaborated upon the principle stated by the majority of this Court (L. ed. at 141-142):

> "'Picketing,' in common parlance and in § 8(b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the streets, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the pickets' side of a controversy. . . . While 'the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution,' Thornhill v. Alabama, 310 U. S. 88, 102, patrolling is, of course, conduct, not speech, and, therefore, is not directly protected by the First Amendment. It is because picketing includes patrolling that neither Thornhill nor cases that followed it lend 'support to the contention that peaceful picketing is beyond legislative control.' Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 499-500. Cf. Schneider v. State, 308 U. S. 147, 160-161. However, when conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press. In such cases it is established that it is the duty of courts, before upholding regulations of patrolling 'to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights' of speech and press. . . ."

Mr. Justice Black concluded that where peaceful picketing is prohibited and the object thereof is lawful:

". . . The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment." (L. ed. at 143)

Thus, this Court has left no doubt that peaceful picketing is the basic right of labor, and, unless specifically prohibited with relation to a delineated matter, it must be permitted. Section 8(f), which allows pre-hire agreements, does not place them in a special hot-house, nor clothe them with special formulae for achievement. There appears in the section no provision denying the right to picket in connection therewith. Since the object is, by statute, legitimate, picketing is proper to attain it.

IV. Where an Employer in the Construction Industry Files a Representation Petition Fifteen Days After Picketing Has Begun, and Withdraws It Approximately One Month Later in Lieu of Dismissal by the Regional Director, Because There Were No Current Employees in the Craft, the Filing Requirements of Section 8(b)(7)(C) and 9(c) Have Been Satisfied, So That the Union May Continue Its Picketing.

The picketing herein was solely informational, and could not have been recognitional. In any event, however, even if the picketing were recognitional, the filing requirement of Section 8(b)(7)(C) was satisfied by the filing of a representation petition by the employer on May 16, 1962 (83a), fifteen days after the picketing started. On June 12, the employer withdrew the petition with approval of the Regional Director, since the Director would have dismissed it anyway, because the employer had stated that it then employed no operating engineers (15a, note 2, 86a, 87a). The filing requirement of Section 8(b)(7)(C) was thus satisfied.

The Act provides that it shall be an unfair labor practice for a union to picket any employer where an object is recognition or bargaining,

> "(C) Where such picketing has been conducted without a petition under section 159(c) of this title being filed within . . . thirty days from the commencement of such picketing. . . ."

The section provides that upon filing, the Board shall forthwith:

> "without regard to . . . the absence of a showing of a substantial interest on the part of the labor organization, direct an election. . . ."

The Board and the Court below held, however, that the petition filed was not sufficient to satisfy the statute, because Noonan had no operating engineer employees at that time. This overlooks the peculiar character of the building and construction trades and the special provisions for this unique industry in the statutory scheme. See Section 8(f) and the proviso to Section 8(e), 29 U. S. C. A. 158(f) and (e). As discussed hereinabove, few employers in the building and construction industry employ a regular complement of employees. It is itinerant or casual employment. Thus, the absence of employees in any certain craft at any time is not determinative of the presence or absence of any rights or interests. Hence, Congress provided for pre-hire agreements with employers who currently employ no workers in the affected craft (29 U. S. C. A. 158 (f)). The ebb and flow of employment in this industry has been legislatively recognized.

In *Trammell Constr. Co.*, 126 NLRB 1365 (1960), the employer was engaged in commercial construction projects in Virginia and Tennessee. It had five regular employees and hired additional men as a particular job required. The employer contended that an election should not be held because it did not have a stable work force and its current

operations were coming to an end. The Board found that the employer would engage in projects and have employees in the future, and, therefore, ordered an election. The unit consisted of all employees who worked for the employer for at least sixty-five days during the year preceding the eligibility date for the election (1366). The Court below states that the reasoning of the *Trammell* case is not applicable, because it would require holding an election among Noonan's former engineers who worked as far back as 1957, noting the "time gap". But, Section 8(f) sustains no such position. In *Trammell*, it happened that employees had worked in the past year. That was merely a fortunate circumstance to the application of 8(f), which provides for recognition when *no* employees are or have been in the unit. It looks to *future* employment and not to the past. If, in the case at hand, a past history of employment does exist, then former employees, who are willing, may be considered for the unit. But such prior history is not essential.

Here, a representation petition was filed within the required one month after the start of picketing and was pending for a few days short of a month. During that period, an election could and should have been directed among the former operating engineer employees of Noonan, in accordance with the principle applied in *Trammell*, based upon substantial, though intermittent, prior employment. Thus, the subsequent withdrawal of the petition by Noonan did not render the union's picketing violative of Section 8(b)(7)(C).

The Court below holds that in absence of current employees in the unit, no election could be held, so that the petition could not result in an election; that, thus, the petition filed was "inoperative". This ignores the statutory concept of the construction industry. Further, if the Board refuses to hold an election for the foregoing reason, Section 8(b)(7)(C) must be deemed inapplicable, since the requirement of an election in absence of an electorate would be a futile demand, which the law will not assert. Thus,

the continued picketing by the union would not be a violation.

The Court's position subjects a labor union to an unfair dilemma. As example, here, two weeks after picketing started, the employer filed the required representation petition. Then, two weeks after the 30 days expired, the employer withdrew its petition. Meanwhile, in view of the employer's petition, the union (assuming here that it *was* seeking recognition) need not have filed its own petition. Then when, after thirty days had expired, the employer's petition disappeared from the scene, the union was left hanging, with an unfair practice charge already pending against it. This result *cannot* be the intention of the remedial policy of the National Labor Relations Act.

Moreover, the statute provides that *a* petition must be filed within the thirty-day period after the picketing begins. It does *not* say that it must be filed *by the union*. The employer, in order to expedite the proceedings, may file the petition the day after the picketing begins, in order to advance his own interest. This sets the election machinery in motion, and this is what the Act was intended to accomplish. It makes no difference *who* sets it in motion. The requirement of the Act has thus been satisfied. If the Board thereafter dismisses or if the employer thereafter withdraws, such action cannot alter the fact that the requirement of the Act has been satisfied, and the union cannot be prejudiced by such action by the employer or the Board.

The impossible situation in which the union is thus placed *cannot* satisfy the policy of the Act. This question must be reviewed by this Court, and the principle fashioned by the Board, affirmed by the Court below, must be reversed.

A. The Position of the Court Below That the Picketing Was Recognitional Materially Conflicts With Its Position Concerning the Employer's Representation Petition. In Holding That Employees Do Exist for Purpose of a Union's Petition, But Do Not for Purpose of an Employer's Petition, the Court Below Raises an Impossible Dilemma Which Can Only Be Solved by This Court.

The Court's positions in each of the respective aspects of this case are mutually and totally paradoxical. *Despite* the absence of engineers currently on the payroll, the Court has decided that the picketing was to force recognition as representative of employees. On the other hand, *in view of* the absence of engineers currently on the payroll, the petition for election of a representative of employees could not be held. Thus, the Court below has decided that Noonan did have employees for the purpose of requiring the filing of a representation petition by the union, but had no employees for the purpose of the same petition filed by the employer.

If the Board and Court below recognized the unique position of a construction union as provided in Section 8(f) and thereby deemed the absence of employees immaterial in adjudicating the existence of a recognitional object, then they had to deem such absence similarly immaterial in considering the effectiveness of a representation petition. But, in either view, Section 8(b)(7)(C) was not violated. If the absence of employees was material, then the picketing could not have been for recognition; if it was not material, and the picketing could have been for recognition, then the employer's representation petition, as soon as filed, was operative, and satisfied subsection (C).

The entire application of the Act by the Board and the Court of Appeals to the facts in this case (which are common and widespread in the construction industry) place

labor in an insoluble dilemma, which can be answered only by this Court. To permit the decision below to stand will render nugatory the entire policy behind Section 8(f), and permit Section 8(b)(7)(C) to deny to labor all of the rights and immunities preserved to it by the Act.

CONCLUSION.

The picketing by the union did not, under any view, violate Section 8(b)(7)(C) of the Act. The language of the section itself, referring to current employees, automatically excepts from its prohibition situations where there are no current employees and where none are planned in the near future.

In addition, the company and the union were already in contractual relationship by act of the parties and by the intendment of the statute which give effect to the employment relation. The picketing was clearly to inform the public of the company's breach of this obligation.

Further, if recognition should have been an object, the filing requirement of 8(b)(7)(C) was satisfied by the petition filed by the employer.

The foregoing considerations have come in issue because of the concept of Section 8(f) taken by the Board and the Court below that subordinates it to Section 8(b)(7)(C), and completely nullifies the approval by the Act of pre-hire agreements. This concept denies the entire intendment of Section 8(f), making practically *impossible* to exist in fact. The denial of the right to picket to obtain a pre-hire agreement renders that section a mere museum-piece, to be viewed, but not used. And, this concept is the direct result of the false assumption by the Board and the Court below that the right to picket must be expressly granted in order to exist. Such a holding conflicts with the very essence of freedom of expression as viewed by this Court, and must be reviewed and reversed.

It is respectfully submitted that the foregoing issues have a most significant effect upon the meaning and operation of the National Labor Relations Act. The decision below should be reviewed by this Court, and reversed.

Respectfully submitted,

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APPENDIX A.

NATIONAL LABOR RELATIONS ACT.

* * * *

§ 158. Unfar Labor Practices.

(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership

was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * *

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an

employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

* * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination of modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence

of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Teritory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 P. M., E. D. T., c. 120, Title I, § 101, 61 Stat. 140; Oct 22, 1951, c. 534, § 1(b), 65 Stat. 601.

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or

agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor

organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

* * * *

§ 159. Representatives and Elections.

HEARINGS ON QUESTIONS AFFECTING COMMERCE; RULES AND REGULATIONS

(c)(1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board—

* * * *

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election

conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,549

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO;
Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued January 22, 1964

Before BIGGS, *Chief Judge;* and FORMAN and GANEY, *Circuit Judges*

OPINION OF THE COURT

(Filed April 27, 1964)

By FORMAN, *Circuit Judge.*

The National Labor Relations Board (hereafter the Board) has petitioned this court for enforcement of a cease and desist order against respondent, Local 542 of

the International Union of Operating Engineers, AFL-CIO[1] (hereafter the Union).

The pertinent facts are as follows:

R. S. Noonan, Inc. (hereafter the Employer) is a Pennsylvania corporation engaged as a general contractor in the construction industry with principal offices in York, Pennsylvania. The interstate character and volume of its business present the necessary jurisdictional features.

Beginning on May 1, 1952, the Employer and the Union entered into a series of collective bargaining agreements in which the Union was recognized as the bargaining representative for employees performing work traditionally done by operating engineers within an area including York and 28 other counties in eastern Pennsylvania. The last of these agreements expired on April 30, 1961.

The Employer was a member of the General Building Contractors Association of Philadelphia with which the Union had a collective bargaining agreement expiring April 30, 1963. This contract, however, covered only five counties in and around Philadelphia and did not include York County.

During the latter part of April 1962 the Union unsuccessfully sought a bargaining agreement with the York County Contractors Association, in which the Employer was also a member, for the 29 counties in eastern Pennsylvania. At the same time, agents of the Union solicited Raymond S. Noonan, the Employer's president, to sign a new contract directly with the Union for the 29 county area. This he declined to do.

The Employer contemporaneously was engaged in fulfilling contracts for the construction of the following four projects in the York County area: (1) the construction of a freight terminal for Motor Freight Express, Inc., York, Pennsylvania; (2) the alteration of a packing plant for Medusa Portland Cement Co., York, Pennsylvania; (3)

1. The decision of the Board and order are reported in Local 542, International Union of Operating Engineers, AFL-CIO and R. S. Noonan, Inc., 142 N. L. R. B. No. 131 (1963).

the construction of dwelling units for the York Public Housing Authority, York, Pennsylvania; and (4) the construction and installation of a converter for P. H. Glatfelter Co., Spring Grove, York County, Pennsylvania.

In performing work on these projects, the Employer reserved to itself some of the labor and subcontracted the remainder. One subcontract, dated April 20, 1962, was with the Hanover Construction Company which operated on an open shop basis. The Employer did not itself then employ any operating engineers. Indeed, it had not employed operating engineers since 1957. Furthermore, the Union was not the certified representative of the Employer's workers. They were members, instead, of various labor organizations in the building trades field, with whom the Employer had collective bargaining agreements.

About May 1, 1962, the Union began to picket the Employer at the Motor Freight, Medusa, York Public Housing Authority, and Glatfelter projects, with signs stating: "R. S. Noonan, Inc. unfair to Operating Engineers Local 542." The Union subsequently changed these signs to read: "Dispute between R. S. Noonan, Inc., and Operating Engineers Local 542."

On May 16, 1962, the Employer filed unfair labor practice charges with the Board against the Union. It alleged that because the Union's picketing of the York area sites was for an object of recognition or bargaining, and for a period of more than 30 days no petition within the meaning of Section 8(b)(7)(C) of the National Labor Relations Act[2] had been filed, the Union was in violation of that section.

Also on May 16, 1962, the Employer filed a representational petition with the Board. It stated that the Union

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2. This section, 29 U. S. C. § 158(b)(7)(C) (Supp. IV 1959-1962), provides that it shall be an unfair labor practice for a labor organization or its agents

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or

has asked for recognition in a unit of operating engineers. But, the petition further stated, there being no employees in this unit, the Employer had refused to recognize the Union.

On June 12, 1962, the Regional Director of the Board received a telegraphic request from the Employer asking for the withdrawal of the petition. He approved the request the same day.

Pending the disposition of the unfair labor practice petition of May 16, 1962, the Regional Director of the Board sought an injunction from the United States District Court for the Middle District of Pennsylvania to restrain the Union from continuing its picketing. On June 27, 1962, the court concluded that there was reasonable cause to believe that the action of the Union violated Section 8(b)(7)(C) and granted an injunction against it until the Board reached its decision in the dispute.[3]

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forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:"

* * *

"(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

3. Schauffler v. Local 542, International Union of Operating Engineers, AFL-CIO [Civil No. 7738], 50 LRRM 2691 (1962). In an order of August 7, 1963, the appeal of the Union was dismissed as moot. (3 Cir., No. 14,163).

After a hearing the Board decided that the Union had violated Section 8(b)(7)(C) and directed the Union, among other things, to:

> "1. Cease and desist from picketing or causing to be picketed, or threatening to picket or cause to be picketed, R. S. Noonan, Inc., where an object thereof is forcing or requiring said employer to recognize or bargain with it as the representative of its employees in violation of Section 8(b)(7)(C) of the Act."[4]

I

The Union urges that in May 1962 the Employer already recognized it as bargaining representative and that the law should imply, from the surrounding circumstances, that there was an existing collective bargaining agreement between them. The picket signs, it apparently contends, were for the immediate purposes of "inform[ing] the public that the Employer was violating its collective bargaining agreement with the Union by subcontracting work within the Union's category on an open shop basis." It thus submits that even though the Union's ultimate object was to formalize the alleged existing implied contractual relationship, under the second proviso to subparagraph C in Section 8(b)(7)[5] the picketing was permissible.[6]

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4. Local 542, International Union of Operating Engineers, AFL-CIO and R. S. Noonan, Inc., supra note 1.

5. This proviso reads:
"*Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." See supra note 2.

6. See Smitly v. N. L. R. B., 327 F. 2d 351, 354 (9 Cir. 1964), where the court quotes with approval the following from N. L. R. B.

The Union suggests that it achieved representational recognition, in part, from Section 3 of the Five County Bargaining Agreement between it and the General Building Contractors Association of Philadelphia, which reads:

> "Section 3. The territorial jurisdiction of the Union covers the eastern half of Pennsylvania and the State of Delaware. This agreement shall apply to all work performed in Philadelphia, Delaware, Bucks, Chester and Montgomery Counties."

The first sentence of the above jurisdictional statement refers to the eastern half of Pennsylvania and the State of Delaware as the geographical area within which the Union was empowered to conduct its operations. The second sentence obviously limits the effect of the agreement to work performed in five counties of the State of Pennsylvania contained within the territorial jurisdiction of the Union.

Nothing in Section 3, explicitly or implicitly, leads to the conclusion that the parties intended that the members of the association recognize the Union as exclusive bargaining representative in the eastern half of Pennsylvania. Accordingly, there is no substance to the Union's contention that Section 3 provides a basis for holding the Employer recognized it as bargaining representative in York and the other 28 counties in eastern Pennsylvania.

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v. Local 3, International Board of Electrical Workers, 317 F. 2d 193, 198 (2 Cir. 1963):

"'It does not necessarily follow that, where an object of the picketing is forcing or requiring an employer to recognize or bargain, the purpose of the picketing, in the context of the second proviso, is not truthfully to advise the public, etc. The union may legitimately have a long range or strategic objective of getting the employer to bargain with or recognize the union and still the picketing may be permissive. This proviso gives the union freedom to appeal to the unorganized public for spontaneous popular pressure upon an employer; it is intended, however, to exclude the invocation of pressure by organized labor groups or members of unions, as such.'".

The Union also cites Zdanok v. Glidden[7] to support the position that the Employer's recognition of it as a bargaining representative survived the expiration of their last written contract. The reliance is misplaced. Analysis of Zdanok reveals that it deals not with the survival of union recognition after the expiration of a bargaining agreement. Rather, it deals with the survival of rights vested in employees, such as seniority, where the employer transferred his plant to another city.

Examination of the Union's arguments supporting the notion that the Employer recognized it as bargaining representative are unpersuasive. The Employer did not in any manner whatsoever recognize the Union as bargaining representative after April 30, 1961—the expiration date of their last written 29 county bargaining agreement.

The Union argues that an implied contractual relationship with the Employer existed after the April 30, 1961 termination date. The alleged reason for this is that the Employer continued to file monthly reports until May 15, 1962 with the Union's Health and Welfare Fund and Pension Fund, although the aforementioned written agreement containing such a provision[8] had terminated. The Union points out that the 29 county collective bargaining agreement which was to be effective May 1, 1961, but never signed by the Employer, provides for such filing.

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7. 288 F. 2d 99 (2 Cir. 1961), which rev'd 185 F. Supp. 414 (S. D. N. Y. 1960); pet'n for reh'g and reh'g en banc denied, 288 F. 2d 99 (2 Cir. 1961); cert. granted solely on issue whether Court of Claims Judge on Court of Appeals panel invalidated the decision, 368 U. S. 814 (1961); aff'd 370 U. S. 530 (1962); reh'g denied 371 U. S. 834 (1962); concerning retrial on damages, see 216 F. Supp. 476 (S. D. N. Y. 1963).

8. The provision required the Employer to make certain payments into a Health and Welfare Fund and a Pension Fund on a man-hour basis for "every operating engineer, oiler and apprentice engineer employed by such employer throughout the period of this contract."

The monthly reports through April 1962 showed no employees and no contributions. Thereafter, a representative of the Union informed the Assistant Office Manager of the Employer that it was unnecessary to send in a report every month when no operating engineers were employed. Hence, in the last report filed on May 15, 1962, the Assistant Office Manager inserted the following notation: "We do not plan to have engineers in the near future. Therefore this is our last report."

The five county Philadelphia agreement with the Union, which ran from May 1, 1961 to April 30, 1963, however, required a submission of monthly reports substantially similar to the expired and unsigned agreements. By making monthly reports after May 1, 1961, the Employer simply was following the mandate of the five county Philadelphia Association agreement. In no wise did this or any other fact presented by the Union imply that the Employer acquiesced in the contractual relationship proposed under the unsigned 29 county agreement. Accordingly, the contention of the Union that an implied contractul relationship existed on May 1, 1962 must fail.

We are in agreement with the Board's holding that the Employer did not recognize the Union as a bargaining representative for the area picketed, and that no implied contractual relationship existed between the Union and the Employer. Consequently, there is no merit in the argument of the Union, that the immediate purpose of its "picket[ing] was to inform the public that the Employer was violating its collective bargaining agreement with the Union by subcontracting work within the Union's category on an open shop basis."

Let us assume that the Union was picketing for the primary purpose of advising the public that the Employer did not employ members of, or have a contract with, a labor organization. Its conduct, nevertheless, still should have been prohibited, as an effect thereof, was to induce individuals employed by other persons not to transport

goods or perform services.[9] The second proviso in Section 8(b)(7)(C) [10] proscribes this conduct.

II

The Union takes exception to any finding which states that essentially, the object of the picketing was to force the Employer to recognize and bargain with it. In support thereof, it points out that at the time of the picketing there were no operating engineers working for the Employer that the Union could represent. As stated, the Employer had not hired any operating engineers since 1957, nor was it planning to hire any within the foreseeable future.

The Board, on the other hand, states there was no certainty that the Employer never again intended to hire operating engineers. And for this reason, among others, it concludes that the Union wished the Employer to recognize it as the bargaining representative for operating engineers.

The Union's objection to the finding that its picketing was for the object of recognition also lacks merit. Though the Employer had not employed operating engineers since 1957, the Union had seen fit to enter into written collective bargaining agreements with the Employer until they expired on April 30, 1961. By picketing the Employer, the Union wished to restore this status.

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9. We agree, as did the Board, with the Intermediate Report filed by the Board's Trial Examiner, George A. Downing, that the picketing had the following effects:

"Around May 2, truckers hauling reinforcing steel from Bethlehem Steel Company to the Motor Freight job refused to cross the picket line to make deliveries. Rodsetters employed by Lucking Brothers, a contractor, to install the reinforcing steel refused to cross the picket line. On the Medusa job, employees of all crafts, including employees of subcontractors, refused to cross the picket line and remained off the job until the entry of the injunction. On the Public Housing Job, employees of the electrical contractor (a prime contractor) refused to cross the picket line. On the Glatfelter job, employees of other prime contractors, as well as Noonan's subcontractors, refused for 3 days to cross the picket line. * * *"

10. Supra note 5.

Moreover, at the time of the picketing in May, 1962, the Employer was subcontracting work of operating engineers, a practice of course offensive to the Union, to the non-union Hanover Construction Company. Indeed, if the Employer had signed a collective bargaining agreement, it would be reasonable to infer that the Union would have attempted to secure for its members the work within the mechanical jurisdiction of operating engineers.

Accordingly, the object of the Union's picketing, essentially, was to force the Employer to recognize and bargain with it.

III

The Union argues, nonetheless, that its picketing was proper. It points to Sections 8(b)(7)(C) [11] and 9(3) [12] of the National Labor Relations Act which, among other things, validate recognitional or bargaining picketing when a representational petition is filed with the Board within a reasonable period of time not to exceed thirty days after

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11. Supra note 2.

12. This Section, 29 U. S. C. § 159(c) (1958), as amended, 29 U. S. C. (c) (Supp. IV 1959-1962) states:

"§ 159. Representatives and elections."

* * *

"(c) Hearings on questions affecting commerce; rules and regulations.

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—"

* * *

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section: the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

* * *

the commencement of the picketing. Specifically, the Union contends that the Employer's filing of a representational petition on May 16, 1962, in response to the picketing which commenced on May 1, 1962, fulfilled this requirement.

Section 8(b)(7)(C) [13] also provides that if an appropriate petition has been filed, the Board shall forthwith "direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof." Putting to one side that the Employer withdrew the petition on June 12, 1962, with the approval of the Board's Regional Director, it is still apparent this petition was inoperative as a basis for an election.

In the instant case the picketing commenced May 1, 1962, while the Employer had not used operating engineers since 1957. There was, at the time of the picketing, no nucleus of regular operating engineer employees that could have voted in a representational election.

Trammel Construction Company,[14] cited by the Union, is inapposite to the present facts. It dealt with an employer of commercial construction projects which had a nucleus of five regular employees and clearly intended to hire more employees in the future. Therefore, the Board directed that an election be held among a unit consisting of all employees who worked for the employer for at least sixty-five days during the year preceding the eligibility date for the election.

In the present case, to have held an election among the Employer's former operating engineers who worked for the Employer as far back as 1957, as the Union suggests, would have been unreasonable owing, among other things, to the time gap. An election satisfying the requirements of 8(b)(7)(C), consequently, was impossible. This is a sufficient and substantial reason for the ruling by the Board that the Employer's petition was inoperative. Thus,

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13. Supra note 2.

14. 126 N. L. R. B. 1365 (1960).

we must reject the contention that the filing of the petition by the Employer made the Union's picketing proper.

IV

The Union takes issue with the conclusion that an election must be feasible before the representational petition could be deemed operative, because this ignores, it asserts, the peculiar circumstances of the construction business, involved herein. In this industry the employer hires workers not on a normal yearly basis but on an irregular job basis. If no construction workers were being employed on or about the time of the filing of a representational petition, elections may be impossible, the Union reasons. It thus suggests that making the election requirement of Section 8(b)(7)(C) applicable to picketing in the construction industry will preclude picketing that will bring about recognition for the purpose of concluding pre-hire agreements.

Congress in Section 8(f) of the National Labor Relations Act [15] has given its sanction to the *voluntary* negotiation of pre-hire agreements in the construction trade, though no employees may be working in the particular craft unit and the majority status of the union cannot be established. But it is quite another matter to permit picket-

15. This section, 29 U. S. C. § 158(f) (Supp. IV, 1959-1962) provides:

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later; * * *."

ing of a construction industry employer under the instant circumstances.

Here, aside from the lack of union recognition, there were no union operating engineers working for the Employer during the time of the picketing—May 1 to June 27, 1962. Furthermore, at that time there could have been no formulation of a nucleus of regular employees who had worked for the Employer. In fact, as already related, no member of the Union had worked for the Employer since 1957.

To allow picketing in this case by disregarding the election requirements would be improper. This would license a Union's use of coercion upon an employer to sign a pre-hire agreement, where the majority status of the union could not be established by an election. Congress has not gone so far as to permit picketing to compel execution of a pre-hire agreement in these circumstances.[16]

V

The Union points out that Section 8(b)(7) proscribes picketing

"any employer where an object thereof is forcing or requiring an employer to recognize or bargain with

16. See N. L. R. B. v. International Hod Carriers, 285 F. 2d 397 (8 Cir. 1960), cert. denied 366 U. S. 903 (1961), which the Board has brought to our attention. It stated at page 403:

"Union also attempts to demonstrate the legality of its objectives by citing us to § 8(f) of the 1959 amendments. * * *. Although Congress has given validity to such an agreement, *voluntarily* entered into by the parties we find no congressional approval of the use of strikes or picketing to compel execution of a prehire agreement. Indeed, the legislative history indicates the contrary to be true. The Conference report which deals with the subject, states: 'The conference adopted the provision of the Senate bill permitting prehire agreements in the building and construction industry. Nothing in such provision is intended * * * *to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreements.*' (Emphasis supplied.)"

Also see Sperry v. Local Union No. 562, Etc., 210 F. Supp. 743, 747-48 (W. D. Mo. 1962).

> a labor organization as the representative of *his employees* * * *." (Emphasis added.) [17]

From this, it argues that the statute's use of the term "his employees" refers only to current employees and not to prospective employees. It thus submits that because no operating engineers were working for the Employer at the time of the picketing, the present case falls outside the limitations of Section 8(b)(7).

To hold that "his employees" refers merely to current employees would bring about an anomalous situation.[18] A union picketing for a recognitional purpose, where the employer currently employs workers in the particular craft of the union, would be subject to the requirement that a representational petition be filed within a reasonable period of time not to exceed thirty days. Yet, if there were no current employees and only a possibility of prospective employees, the Union's recognitional picketing would be unaffected by any requirement of filing a petition with the Board, if we accept the construction that the statute applies only to current employees. It then could picket, presumably, ad infinitum. Such a construction would be an unreasonable interpretation of the Act.

As stated in the decision [19] of the Board herein:

> "The primary purpose of Section 8(b)(7) is to limit the impact of recognitional or organizational picketing upon an employer or his employees, so that questions of representation may be settled by orderly processes and in accord with the free choice of employees.

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17. Supra note 2.

18. See Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al. v. National Labor Relations Board, 130 N. L. R. B. 558 (1961), aff'd 307 F. 2d 197 (D. C. Cir. 1962), and Sperry v. Local Union No. 562, Etc., supra note 16.

19. Local 542, International Union of Operating Engineers, AFL-CIO and R. S. Noonan, Inc., supra note 1.

> In our view, a holding here that a union can picket indefinitely to force an employer to sign a prehire contract would run contrary to the purposes of the section."

The contention of the Union, that a proper interpretation of Section 8(b)(7) compels the conclusion that the words "his employees" refer only to current employees, is baseless.

The Union has advanced other points in addition to those discussed herein. Examination thereof leaves us unpersuaded that they are meritorious.

The object of the Union's picketing from May 1 to June 27, 1962, essentially, was to force and require the Employer to recognize and bargain with it. By doing this, without then being certified as the representative of the employees, and because the Employer's representational petition under Section 9(c) was inoperative, the Union engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the National Labor Relations Act.

Therefore, a decree will be entered enforcing the order of the Board in full.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14549.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondent.

DECREE.

Before: BIGGS, *Chief Judge* and FORMAN and GANEY, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent on June 14, 1963. The Court heard argument of respective counsel on January 22, 1964, and has considered the briefs and transcript of record filed in this cause. On April 27 1964, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the

Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Local 542, International Union of Operating Engineers, AFL-CIO, its officers, agents, representatives, successors and assigns, abide by and perform the directions of the Board in said order contained.

By THE COURT,

PHILLIP FORMAN,
Circuit Judge.

Dated: May 15, 1964

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OCTOBER TERM, 1964

No. 376

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 39–53) is reported at 331 F. 2d 99. The Board's Decision and Order (B.A. 7a–25a)[1] are reported at 142 NLRB 1132.

JURISDICTION

The decree of the court of appeals was entered on May 15, 1964 (Pet. 54–55). The petition for a writ of certiorari was filed on August 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "B.A." refers to the Board's appendix in the court below, which has been filed with the petition.

QUESTION PRESENTED

Section 8(b)(7)(C) of the National Labor Relations Act makes it an unfair labor practice for a labor organization that is not currently certified as the representative of the employees to picket an employer with an object of requiring him to recognize or bargain with it, for more than a reasonable time (not to exceed 30 days) after the commencement of such picketing, unless within such period a petition for a representation election is filed with the Board. The question presented is whether, in the circumstances of this case, the petitioner Union's picketing violated that Section.

STATUTE INVOLVED

Certain relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are reprinted in the petition at pp. 31–38. In addition, the whole of Section 8(b)(7) is set forth below:

> SECTION 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organi-

zation is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

STATEMENT

From May 1, 1952 to April 30, 1961, the petitioning Union was party to a series of individual collective bargaining agreements with R. S. Noonan, Inc. ("Noonan") (Pet. 40; B.A. 154a, 172a, 190a). Noonan is a general contractor in the building and construction industry in Pennsylvania and several other states (Pet. 40; B.A. 28a, 71a–77a). During the time relevant here, Noonan was operating at four construction sites in York County, Pennsylvania (Pet. 40–41; B.A. 42a–43a, 72a, 74a–75a, 81a). In accordance with its usual practice, Noonan reserved only a certain portion of the work on these projects for performance by its own employees and subcontracted the remainder to various subcontractors (Pet. 41; B.A. 14a, 43a, 48a).

The last individual collective bargaining agreement between Noonan and petitioner, which expired on April 30, 1961, covered 29 counties in Pennsylvania, including York County (Pet. 40; B.A. 190a–191a). Under this agreement, Noonan recognized petitioner "as the collective bargaining agent for all persons performing work within the [mechanical] jurisdiction of the Union," *i.e.*, operating engineers (Pet. 40; B.A. 191a).[2] Since 1957, however, Noonan had not had any

[2] Noonan, as a member of the General Building and Contractors Association of Philadelphia, was also party to a multi-employer agreement giving petitioner similar recognition as collective bargaining agent for operating engineers employed within a 5-county area around Philadelphia, Pennsylvania, which did not include York County. This agreement did not expire until April 30, 1963 and was thus in effect during the period relevant here (Pet. 40; B.A. 39a, 125a–126a).

such employees on its payroll (Pet. 41; B.A. 29a–30a, 37a–38a, 48a–49a, 57a–58a, 69a). Whenever in recent years the need for operating engineers had arisen on its various construction projects, Noonan had subcontracted the work (B.A. 37a–38a, 48a–49a).

In these circumstances, petitioner was not then certified as the representative of any of Noonan's employees. Those employees were members of other labor organizations in the building trades field with which Noonan has collective bargaining agreements (Pet. 41; B.A. 49a).

In the latter part of April 1962, approximately a year after expiration of the last individual agreement between Noonan and petitioner, Union representatives met with Noonan's president in an effort to get Noonan to sign a new agreement for the 29-county area, including York (Pet. 40; B.A. 30a–34a). Noonan refused to do so and, on approximately May 1, 1962, petitioner began to picket Noonan at its four construction sites in York County (Pet. 41; B.A. 27a–28a, 42a–43a). The picket signs, which originally stated, "R. S. Noonan, Inc., Unfair to Operating Engineers Local 542," were later changed to read: "Dispute between R. S. Noonan, Inc., and Operating Engineers Local 542" (Pet. 41; B.A. 43a).

The picketing had the following effects: (1) at one construction project, truckers delivering reinforcing steel refused to cross the picket line, as did employees hired by a subcontractor to install the reinforcing steel (Pet. 47, n. 9; B.A. 44a–45a); (2) at another project, employees of all crafts, including employees of Noonan's subcontractors, refused to cross the picket

line and remained off the job until the picketing was enjoined on June 27 (Pet. 47, n. 9; B.A. 45a–46a); (3) at a third project, employees of the prime contractors refused to cross the line (Pet. 47, n. 9; B.A. 46a–47a); and (4) at a fourth, both employees of prime contractors and of Noonan's subcontractors refused to cross the picket line for three days (Pet. 47, n. 9; B.A. 47a–48a).[3]

On May 16, 1962, Noonan filed a petition for a representation election with the Board (Pet. 41; B.A. 83a). The petition recited that the Union had made a request for recognition in a unit of "[all] operating engineers," that there were no employees in the unit, and that Noonan had declined recognition (Pet. 41–42; B.A. 83a–85a). On June 12, the Board's Regional Director approved withdrawal of this petition upon Noonan's request (Pet. 42; B.A. 86a–87a).[4]

On May 16, 1962, Noonan filed unfair labor practice charges, amended on May 17 and 25, alleging that petitioner's picketing violated Section 8(b)(7)(C) of the Act (Pet. 41; B.A. 71a, 78a, 80a).[5] The Board

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[3] After the first three days of picketing on projects (2) and (4) above, separate gates were opened for two prime contractors there. On subsequent days, the employees of those contractors and others doing business with them used the new gates. But the picketing continued at the other entrances, which were used by Noonan and its subcontractors (B.A. 55a–56a).

[4] The Regional Director would have dismissed the petition, in any event, because Noonan employed no operating engineers among whom a representation election could have been conducted (Pet. 49; B.A. 27a).

[5] On June 11, 1962, the Board's Regional Director, pursuant to Section 10(l) of the Act, filed a petition in the United States District Court for the Middle District of Pennsylvania, to en-

found (B.A. 6a–11a, 17a–22a) that an object of the Union's picketing was to force or require Noonan to recognize or bargain with the Union, although it was not the certified representative of the employees in question; that this picketing had continued for more than 30 days without an operative representation petition having been filed; and that the picketing thus violated Section 8(b)(7)(C) of the Act. The Board's order requires the Union to cease and desist its illegal picketing, and to post appropriate notices (B.A. 11a, 23a–25a).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. 39–53).

ARGUMENT

Section 8(b)(7)(C) of the Act, added in 1959, makes it an unfair labor practice for a union, unless it is "currently certified as the representative" of the employees, to picket an employer for recognitional or organizational purposes for more than a reasonable period of time (not to exceed 30 days), without a representation petition having been filed with the Board. If such petition is filed within that period, the first proviso to Section 8(b)(7)(C) provides that the Board "shall forthwith * * * direct an election in such unit as the Board finds to be appropriate and shall certify the re-

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join petitioner's picketing pending a final adjudicaton of the unfair labor practice charges by the Board. On June 27, 1962, the district court granted the injunction (Pet. 42). *Schauffler v. Local 542, International Union of Operating Engineers, AFL–CIO*, Civil No. 7738, 50 LRRM 2691. Petitioner's appeal from the district court's order was dismissed by the court of appeals for mootness on August 7, 1963 (Pet. 42, n. 3).

sult thereof." The second proviso to Section 8(b)(7)(C) exempts from its requirements certain informational picketing, unless such picketing has "an effect" on deliveries or the performance of services at the picketed premises. The court of appeals correctly concluded that petitioner's picketing of Noonan violated Section 8(b)(7)(C). There is no conflict of decisions and no occasion for further review.

1. Petitioner contends (Pet. 9–15) that its picketing was not to compel Noonan to sign a recognition agreement, but merely to advise the public that Noonan was not living up to a collective bargaining agreement that it already had with the Union. However, both the Board and the court below found (Pet. 40, 45; B.A. 16a) that, at the time of the picketing, Noonan had no collective bargaining agreement with the Union covering the area involved—the last individual agreement between Noonan and the Union for the 29-county area, including York, having expired approximately a year before the events here took place.

Petitioner's attempts to imply a continuation of the recognition accorded in that agreement are unavailing. The fact that the employer has granted recognition to a union in a collective bargaining agreement obviously does not vest the union with a right to represent the employees involved for all time—even after the contract has long expired and the employees are no longer working for that employer.*

* As the court below noted, *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (C.A. 2), upon which petitioner relies (Pet. 11), "deals not with the survival of union recognition after the expiration of a

Nor may petitioner derive support from the unexpired multi-employer agreement to which Noonan was a party; the terms of that agreement were specifically limited to the 5-county area around Philadelphia—an area not involved in the dispute here (n. 2, p. 4, *supra*).[7] Similarly, Noonan's continued monthly reports to the Union's pension and welfare funds do not show a continuation of the contractual relationship for the 29-county area, including York. These reports were also required by the unexpired multi-employer agreement for the Philadelphia area, and, according to the official of Noonan who made the reports, they were filed solely in conformity with that agreement, following expiration of the last York agreement in April 1961 (Pet. 45–46; B.A. 62a–64a).[8]

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bargaining agreement * * * [but] with the survival of rights vested in employees, such as seniority, where the employer transferred his plant to another city" (Pet. 45).

[7] Contrary to petitioner, the specification in the multi-employer agreement of "the eastern half of Pennsylvania and the State of Delaware" (B.A. 126a) as the "territorial jurisdiction" of the Union does not constitute recognition of petitioner as the collective bargaining representative of all operating engineers employed within that area. The previous individual agreements between Noonan and petitioner, covering York County, also specified the eastern half of Pennsylvania and the State of Delaware as the territorial jurisdiction of petitioner (B.A. 154a–155a, 172a, 190a). As the court below noted (Pet. 44), the second sentence of the coverage clause in the multi-employer agreement "obviously limits the effect of the agreement to work performed in five counties of the State of Pennsylvania contained within the territorial jurisdiction of the Union," i.e., Philadelphia, Delaware, Bucks, Chester and Montgomery Counties.

[8] Nor is there any substance to petitioner's contention (Pet. 13–15) that its picketing, even if for a recognitional object, was purely informational and thus protected by the second proviso to Section 8(b)(7)(C). First, the picket signs themselves

2. Emphasizing the words "his employees" in the portion of Section 8(b)(7) which limits the Section to picketing for certain objectives,[9] petitioner contends (Pet. 15–18) that the Section is applicable only where the employment is then in existence, and not where, as here, it is, at most, merely prospective. There is no substance to this contention. The words "his employees" may properly be read as encompassing prospective as well as existing employees,[10] and such reading effectuates the overall purpose of Section 8(b)(7). On the other hand, as the court below pointed out (Pet. 52), petitioner's interpretation would be out of harmony with that purpose.

The basic purpose of Section 8(b)(7) is to place a limit on the use of a picket line for recognitional or organizational purposes, and the limitations of the provision have been deemed applicable, not only where the union represents none or only a minority of the employees, but even where it in fact represents

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were not in the form contemplated by the proviso. Originally, they simply charged Noonan with being "[u]nfair" to petitioner; later, they were changed to read "Dispute between R. S. Noonan, Inc. and Operating Engineers, Local 542" (Pet. 41; B.A. 42a–43a). Moreover, the proviso is not applicable where the picketing has a substantial effect on deliveries, and there is ample basis in the record for the finding of the Board (B.A. 21a), approved by the court below (Pet. 47, n. 9), that the stoppages here were substantial.

[9] The provision proscribes picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees * * *."

[10] Cf *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177.

a majority.[11] Picketing to force recognition before any employees are hired offends this statutory scheme no less, and perhaps even more, than does picketing to attain such objective where some or all of the employees are already on the job.[12]

To construe Section 8(b)(7) as applicable to prehire recognitional picketing does not, as petitioner suggests (Pet. 18–24), run contrary to Section 8(f) of the Act. Although the latter Section validates the voluntary execution of prehire agreements in the building and construction industry, its legislative history makes clear that it was not intended to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign such an agreement. See 104 Cong. Rec. 11308; 105 Cong. Rec. 18128, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1715 (G.P.O.,

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[11] See *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 328 F. 2d 634 (C.A.D.C.); *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153.

[12] *McLeod* v. *Local 140*, 207 F. Supp. 525 (S.D.N.Y.), cited by petitioner (Pet. 16), is clearly inapposite. There, the picketing was found to have no recognitional objective because the picketers were manufacturing employees seeking the return of their jobs and the employer whom they picketed had no manufacturing plant within the jurisdiction of the union local that represented them. Cf. *Local 705, Teamsters* v. *National Labor Relations Board*, 307 F. 2d 197 (C.A.D.C.), where the picketing was found violative of Section 8(b)(7)(C) because its object was to force an employer to discharge current employees, hire members of the union who were not then employed, and recognize the union as their representative. See, also, *Sperry* v. *Local Union No. 562, Plumbers*, 210 F. Supp. 743 (W.D. Mo.).

1959); H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 42, I Legislative History, *op cit. supra*, p. 946. See, also, *National Labor Relations Board* v. *International Hod Carriers, Local No. 1140*, 285 F. 2d 397, 403 (C.A. 8); *Sperry* v. *Local Union No. 562, Plumbers*, 210 F. Supp. 743, 747–748 (W.D. Mo.).[13]

3. Finally, there is no merit to petitioner's contention that the representation petition, filed and subsequently withdrawn by Noonan, tolled the ban of Section 8(b)(7)(C) (Pet. 24–27). Section 8(b)(7)(C) provides that picketing for recognitional purposes is unlawful if it "has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from [its] commencement"; if such a petition is filed, the first proviso to Section 8(b)(7)(C) (p. 3, *supra*) requires the Board to direct an expedited election and to certify the results thereof. The two provisions together show that Congress' intention was to prohibit recognitional picketing after a reasonable period of time not to exceed 30 days, unless steps had been taken within that period to have the underlying representation question resolved by the Board's election procedures; if such steps were taken, the picketing could continue pending the completion of the election procedures (which, in

[13] This limitation on the Union's picketing is not, as petitioner asserts (Pet. 21), an implied one, derived from the failure of Section 8(f) to *authorize* such picketing, but an explicit one, apparent in the prohibitions of Section 8(b)(7). Consequently, there is no occasion for invoking the principle that a ban on peaceful picketing will not be found absent a specific, and carefully delineated prohibition.

order to avoid an undue prolongation of the picketing, were expedited).[14] It follows, as the Board and the court below concluded (Pet. 49–50; B.A. 7a, n. 2), that the mere filing of a timely representation petition is not enough to suspend the limitation of Section 8(b)(7)(C); only such a petition as is capable of furnishing the basis for a representation election can do so.[15] The petition filed by Noonan could not have served as the basis for an election. For since Noonan had not employed operating engineers since 1957, it had no employees who could have voted in the election. Noonan withdrew the petition, presumably because it would otherwise have been dismissed by the Board's Regional Director on that ground (see n. 4, p. 6, *supra*).[16] The Board thus properly held that the Noonan petition was not an operative one for purposes of Section 8(b)(7)(C).

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[14] If the union won the election and were certified, it could continue recognitional picketing indefinitely, by virtue of the specific exemption in Section 8(b)(7) for a "labor organization which is currently certified as the representative of [the] employees." On the other hand, if the union lost the election, continued cognitional picketing would be barred under Section 8(b)(7)(B), which prohibits such picketing "where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted." See *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1156–1159.

[15] See *Chicago Printing Pressmen's Union (Moore Laminating, Inc.)*, 137 NLRB 729.

[16] *Trammell Construction Company*, 126 NLRB 1365, cited by petitioner (Pet. 25–26), is distinguishable, for the employer there had a nucleus of five regular employees and clearly intended to hire more in the future.

CONCLUSION

For the reasons stated above, we respectfully submit that the petition for a writ of certiorari should be denied.

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